(1) 88-386

No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1988

YELLOW BUS LINES, INC.,
PAULA WESTGATE, MARIA TRIGGS, AND
PETER McKINNON,
Cross-Petitioners,

v.

DRIVERS, CHAUFFEURS AND HELPERS LOCAL
UNION NO. 639 a/w INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,
AFL-CIO, and JAMES F. WOODWARD,
Respondents.

Cross-Petition for a Writ of Certiorari to the United States Court of the Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether a union can associate in fact with one of its officers to form an "enterprise" within the meaning of 18 U.S.C. § 1961(4) of RICO.

2. Whether, in a case brought under § 1962(c) of RICO, a union and one of its officers can be both the "persons" who conduct an enterprise's activities through a pattern of racketeering and the "enterprise" whose affairs are so conducted.

3. Whether the cross-petitioners' Seventh Amendment right to a jury trial was violated where the jury's verdict was set aside based on an evaluation of the evidence which in general failed to take every inference in favor of the jury's verdict and in particular misread the date on a notice of deposition filed with the court and refused to connect the union's campaign of sabotage and bad faith litigation against Yellow Bus with the company's inability to pay its bills.

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WAREHOUSEMEN AND HELPERS OF AMERICA,
AFL-CIO, and JAMES F. WOODWARD,

Respondents.

Cross-Petition for a Writ of Certiorari to the United States Court of the Appeals for the District of Columbia Circuit

The cross-petitioners, Yellow Bus Lines, Inc. ("Yellow Bus"),[1] Paula Westgate, Maria Triggs, and Peter McKinnon respectfully cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on February 12, 1988.

[1]Cross-petitioner Yellow Bus has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

Opinion Below

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 839 F.2d 782 and is reproduced in the Petitioners' Appendix at 1a-25a. The decisions of the United States District Court for the District of Columbia are unreported and are reproduced in the Petitioners' Appendix at 26-65a.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on February 12, 1988. Pet. App. 2a. Cross-petitioners timely filed for rehearing on March 11, 1988. The Circuit Court's order denying rehearing was entered on May 6, 1988. Pet. App. 73a. The petition was received by cross-petitioners on August 2, 1988. This cross-petition is timely filed pursuant to Rule 19.5 of the Rules of this Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional Provision and Statutes Involved

The Seventh Amendment to the Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, provides in pertinent part:

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property:

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

18 U.S.C. § 1961 (3) and (4)

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated within the meaning of Section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18. U.S.C. § 1962(a), (b), (c), and (d).

Statement of the Case

The necessary facts are set out in Cross-Petitioner's Statement of the Case in its Brief in Opposition to the Petition for Certiorari (pp. 1-4).

Reasons Why the Cross-Petition Should be Granted

1. The Circuit Court incorrectly concluded that Woodward and Local Union 639 could not serve simultaneously as an "enterprise" and as "person[s]" under RICO.

Yellow Bus' original complaint alleged that Woodward together with Local 639 constituted "an enterprise" within the meaning of 18 U.S.C. § 1961(4) and treated Woodward

and Local 639 as "person[s]" within the meaning of § 1961(3) whose conduct violated 18 U.S.C. §1962(c) and (d).

The Circuit Court noted that three out of four Circuit Courts which had considered this issue had concluded that the "person" and "enterprise" had to be distinct under Section 1962(c). According to the Circuit Court, this result flowed both from the language of 18 U.S.C. § 1961(4) which defines enterprise to include "any individual [etc.] . . . and any group of individuals associated in fact," and the policy behind RICO. On the language prong of its argument, the Court quoted Judge Posner of the Seventh Circuit to the effect that "you cannot associate with yourself." *McCullough v. Suter*, 757 F.2d 142, 144 (7th Cir. 1985). Pet. App. 13a.

On the policy prong the Circuit Court made two arguments. It pointed out that "[a]bsent the non-identity requirement, *respondeat superior* could operate to impose § 1962(c) liability on a corporation that is unaware of the racketeering activities of its agents and has not been enriched by those activities" (Pet. App. 15a). It also noted that corrupt organizations which conduct their own affairs by illegal means may often be subject to another section of RICO, §1962(a), which prohibits the receipt and subsequent investment of racketeering proceeds. Pet. App. 14a.

The Circuit Court found unavailing Yellow Bus' attempt to avoid the non-identity requirement by depicting the RICO enterprise as an "association-in-fact" comprised of Local 639 and Woodward, an entity distinct from the named defendants. After noting a conflict in the authorities, the Circuit Court concluded that "an organization cannot join with its own members to do that which it normally does and thereby form an enterprise separate and apart from itself" (Pet. App. 17a) because (1) "there is no difference between the union as an entity including Woodward as officer, and the union plus Woodward"

(Pet. App. 17a) and (2) allowing plaintiffs to generate such contrived partnerships consisting of an umbrella organization and its subsidiary parts, would render the non-identity requirement of § 1962(c) meaningless (Pet. App. 17a).

As we see it, however, at least three Circuit's decisions support Yellow Bus' contention here. In *United States v. Hartley*, 678 F.2d 961, 987-90 (11th Cir. 1982), the court found that there need not be a distinction between a "person" and "enterprise" in actions brought under 18 U.S.C. §§ 1962(c) and (d), at least, as here, where a corporation is not involved. In *McCullough v. Suter, supra*, the Seventh Circuit held that a sole proprietorship could be an "enterprise" with which its proprietor could be "associated" within the meaning of 18 U.S.C. § 1962(c) so long as the sole proprietorship had other employees or associates. In *United States v. Benny*, 786 F.2d 1510, *cert. denied* 107 S.Ct. 668 (1986), the Ninth Circuit came to the same conclusion. *McCullough* and *Benny* directly support Yellow Bus here against the District of Columbia Circuit's conclusion that "an organization cannot join with its own members to do that which it normally does and thereby form an enterprise separate and apart from itself."

The Circuit Court's arguments addressed to the literal language of the statute are also not well taken. It may be true that "you cannot associate with yourself" but you can certainly be associated with something of which you are a part, as, for example, an associate in a law firm. Likewise, it may be true that a union cannot join with a member to do what it normally does and thereby form something distinct, but this proposition does not address the facts of the instant case because unions do not "normally" engage in racketeering activity. More importantly, the Circuit Court's reasoning, in relying on Woodward's legal subsumption by the union of which he was a member, substitutes an "associated in law" approach for the term actually used, "associated in fact although not

entity." Local 639 and Woodward are obviously associated in fact.

Finally, the RICO policy argument goes entirely the other way. Cases such as the present one, in which a union generally viewed as racketeer-influenced repeatedly uses criminal acts of violence and extortion to force itself on a company, were obviously among those cases that Congress intended to reach. § 1962(a) cannot reach this case unless the evil-doer is successful and obtains proceeds to invest. § 1962(b) may, as the Circuit Court found, apply, but it surely is a more awkward formulation to say that Woodward and Local 639 conducted the affairs of Yellow Bus through a pattern of racketeering activity than it is to say they conducted their own affairs through a pattern of racketeering. The Circuit Court's concerns with *respondeat superior* are well-taken, but the way to meet them is to require the plaintiff to show that the principal was aware of his racketeering agents acts and ratified them. In that way "innocent organizations" (Pet. App. 15a) will escape prosecution, but guilty ones will not.

Congress has specifically directed that RICO be "liberally construed to effect its remedial purpose." Pub. L. No. 91-452, § 504(a), 84 Stat. 947 (1969). Congress specifically cited racketeering in the "trucking business as one of the targets of RICO. S. Rep. No. 91-617, 91st Cong., 1st Sess. 78 (1969). The Circuit Court's ruling in this case forecloses the most obvious legal remedy against the typical unlawful conduct of this union.

Because the Circuit Courts are divided (1) on the issue whether a "person" and an "enterprise" must be distinct under 18 U.S.C. § 1962(c) and (2) on the issue whether an organization can join with some of its members to form an "enterprise" separate from itself, and because these issues frequently recur and cannot be resolved without this Court's intervention, the cross-petition for certiorari should be granted.

II. The Circuit Court's decision failed to take every inference in favor of the jury's verdict and otherwise misread the record.

(a) Contrary to the Circuit Court's opinion, the record conclusively establishes (1) that Woodward's lawyer commenced discovery three months *before* the criminal charges against Woodward were resolved by a plea bargain and (2) that obtaining a discovery in the civil action for use in the criminal action was one of the reasons for filing the civil action.

The Circuit Court wrote:

> Appellants' abuse of process claim fails because one of the alleged ulterior aims is implausible, and the other was not achieved. The appellants claimed that Woodward sought to discover information vital to his criminal defense and to coerce the company to make labor concessions. However, the fact that Woodward's lawyer did not commence discovery until *after* Woodward's criminal charges were dropped conclusively discredits discovery as an "ulterior motive." Pet. App. 9a-10a, emphasis supplied.

The record, we respectfully submit, is otherwise.

Woodward filed the original complaint in this case on November 4, 1982. Cross-Pet. App. 1a. On November 15, 1982, Woodward's attorney issued a subpoena for production of documents and noted the deposition of Maria Triggs and Paula Westgate for November 26, 1982. Cross-Pet. App. 2a-5a. Woodward resolved the three-count felony indictment (Cross-Pet. App. 6a). by a plea to a misdemeanor on February 8, 1983. Cross-Pet. App. 7a. Accordingly, the record conclusively establishes that Woodward's lawyer "commenced" discovery approximately three months *before* criminal charges were "dropped."

The "alleged ulterior aim" was also not "implausible" because Woodward's lawyer wrote two letters to the President of Local 639, offered in evidence but excluded by the District Court, which referred to a "Proposed civil rights case," urging that the case be filed quickly in order to have the deposition transcripts available for the criminal trial. In his September 20, 1982, letter, Woodward's lawyer wrote:

> Since I think it would be advisable to have the deposition transcripts in this proceeding available for Woodie's criminal trial, now set for December 3, 1982, it is necessary that we begin work on the case shortly. Therefore, we are operating under some close time constraints.

In his October 7, 1982, letter, Woodward's lawyer wrote:

> I will be out of town from tomorrow until October 18, 1982. Hence it does not appear feasible to file the case to allow adequate time to take depositions of the principals and to receive the transcripts of those depositions prior to Woodie's scheduled December 3, 1982 criminal trial. However, if it is to be filed at all, the case must be filed no later than November 6, 1982. In the event that the criminal trial must be rescheduled, however, and if the civil case is filed soon, we may have the deposition transcripts available.

After Woodward filed on November 4, 1982, he noticed the depositions of Paula Westgate, President of Yellow Bus, and Maria Triggs, Secretary-Treasurer of Yellow Bus, for November 26, 1982, just 22 days later and just seven days before his criminal trial scheduled for December 3, 1982. Rule 30(a), F.R.C.P. does not permit depositions in a civil case until 30 days after the filing of the case absent unusual circumstances

which Woodward never proffered. The depositions were in fact not taken before Woodward's plea bargain only because Westgate and Triggs and subsequently the United States moved to stay the depositions. The evidence provided an adequate basis for the conclusion that at least one reason why Woodward filed the civil case was to obtain evidence for use in his criminal case.

(b) Contrary to the Circuit Court's opinion the record conclusively establishes that one of the ulterior aims was achieved, to wit, to put Yellow Bus out of business.

The Court wrote:

> Appellants' abuse of process claim fails because one of the alleged ulterior aims is implausible, and the other was not achieved. . .. [E]ven if Woodward had initially commenced legal action to induce Yellow Bus to acquiesce in his labor demands, appellants suffered no actionable injury because Woodward did not *accomplish* this impermissible purpose.

Pet. App. 9(a)-10(a), emphasis supplied.

This analysis may well be correct, but it is not dispositive because there was another ulterior aim. At the first meeting between Westgate and Woodward, Woodward told Westgate that "the union had millions and millions of dollars and if [Westgate] decided to fight them that they would take us to court and the result would be Yellow Bus Lines would go out of business." Accordingly, the jury could permissibly conclude that Woodward filed the lawsuit to put Yellow Bus out of business.[2] It is uncontested that Yellow Bus did go out of

[2]Also excluded by the District Court was evidence of legal fees caused by the union's bad faith litigation. These fees exceded Yellow Bus' net profit in its best year and were probably the most important factor in putting Yellow Bus out of business.

business. Accordingly, Yellow Bus has demonstrated not only ulterior motive but success in achieving the impermissible purpose. To recapitulate, the evidence showed that Woodward filed this case for three reasons, (1) to take depositions for use in the criminal case against him, and (2) to get a labor contract from Yellow Bus or (3), as Woodward specifically threatened, to put Yellow Bus out of business. Woodward achieved his third objective.

(c) Contrary to the Circuit Court's opinion, the record conclusively establishes that Yellow Bus did offer evidence of the union's intent to procure a breach of the Jewish Day School ("JDS") contract.

The Circuit Court wrote that Yellow Bus offered "no evidence whatsoever of the Local's *intent* to procure a breach of this *particular* contract" (Pet. App. 8a, emphasis supplied). Yellow Bus' proof in part, showed: (1) Woodward threatened to put Yellow Bus out of business; (2) Woodward was aware Yellow Bus had a contract with JDS; (3) the JDS contract provided 34 to 41% of Yellow Bus' business; (4) on the first day of the strike, a striking driver in Woodward's presence and with his encouragement, threatened to cut the brake lines on one of the buses in front of a parent of two children at JDS; and (5) also, on the first day of the strike, Local 639 picketed at the Jewish Day School, and someone ice-picked tires on the buses parked there.

This evidence provided the jury with a proper basis for concluding that Woodward intended to procure a breach of the JDS contract. The chain of reasoning is (1) Woodward wished to put Yellow us out of business so he wanted to interfere with all of its contracts, (2) Woodward knew of the existence and importance of the JDS contract from talking with the striking drivers, (3) the striking drivers during the strike particularly attacked the JDS contract, (4) Woodward was responsible for

the striking drivers' conduct during the strike, (5) therefore, Woodward intended to procure a breach of this particular contract.

Thus, the striking drivers announced to JDS on the first day of the strike in two dramatic incidents that JDS should not deal with Yellow Bus. The union, as the Circuit Court has found (Pet. App. 4a-8a), ratified that conduct. Therefore, a jury could rationally infer that the union *intended* to procure the breach of this *particular* contract. The Circuit Court was compelled to accept the jury's inference.

(d) Contrary to the Circuit Court's opinion, Yellow Bus did offer evidence connecting the JDS cancellation and the union's malefaction.

The court found that Yellow Bus failed to offer "the most elementary evidence of any causal connection between the cancellation and the appellees' malefaction" (Pet. App. 9a). The record, we respectfully submit, is otherwise.

Yellow Bus' evidence showed that it went out of business because it lost it's school contracts, chiefly the JDS contract. It lost the JDS contract, as the Court found, (1) because of its difficulties with the IRS and (2) inadequate service (Pet. App. 9a).

The Circuit Court minimized any causal link between Yellow Bus' difficulties with the IRS and the union on the ground that "Yellow Bus difficulties with the IRS pre-dated the Local's involvement with the company" (Pet. App. 9a). This is true but not important. The only tax payment which Yellow Bus missed prior to the Local's involvement was a withholding tax payment due September 30, 1981, in the amount of $3,747.77. Westgate testified this was a cyclical problem in the bus business resulting from no business in August and the need to pay insurance premiums in September. The amount could

have been made up before the end of the year but for the $3,200 in malicious destruction of property (Pet. App. 4a).

The Circuit Court found no connection between the union's activities and inadequate service because (1) "[a]bundant testimony linked the company's poor performance to lax employee discipline and the rapid deterioration of the company's stock of antiquated busses after the departure of its only skilled mechanic in the fall of 1982" (Pet. App. 9a) and (2) "[a] number of Yellow Bus' own witnesses admitted that these difficulties were not traceable to appellees' efforts or action" (Pet. App. 9a).

Yellow Bus concedes the first proposition.[3] That was the theory of its case. The record does not support the second proposition.

With respect to the first proposition, Westgate testified uneqivocally that Yellow Bus could not discipline its drivers because whenever it attempted to discipline a pro-union driver, an unfair labor practice charge would be filed. Nine of these ten unfair labor practice charges were later dismissed, and the evidence at trial, taking every inference in favor of Yellow Bus, showed that that charge was also meritless. Westgate testified specifically that because pro-union drivers could not be disciplined, Yellow Bus could not discipline anti-union drivers, who perceived a double standard.

Yellow Bus lost Peter McKinnon, its skilled mechanic, because he became psychotic. Dr. Kalibat, a distinguished psychiatrist, testified that McKinnon became psychotic due

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[3]Absenteeism more than doubled in the year following the strike. Subcontracting expenses, the need to hire other bus companies when Yellow Bus' drivers were absent, quintupled. Maintenance costs increased by a third. Gross receipts also increased in the year following the strike, but net receipts declined, and the company ceased to be profitable.

to the pressure on him to safeguard the lives of the school children despite the drivers' sabotage of the buses.[4] In short, the jury could properly infer that the lax employee discipline and the loss of McKinnon resulted from the union's activities.

Even had they done so, it would be irrelevant whether any of Yellow Bus' witnesses admitted that these difficulties were not "traceable to appellees' efforts" (Pet. App. 9a). Whether the difficulties were attributable to the union within the contemplation of 29 U.S.C. § 106 was a conclusion of law, objected to as such, as to which none of Yellow Bus' witnesses were competent to testify. *See, United States v. Phillips*, 478 F.2d 743, 746, n. 6 (5th Cir. 1973). It was not only an issue of law but a difficult one because the Circuit Court held that the District Court, itself, misinterpreted 29 U.S.C. § 106. Pet. App. 4a-8a.

In any event, Yellow Bus' testimony, taking every inference in favor of the jury verdict, provides no support for the Court's conclusion. When laymen such as Westgate and McKinnon testify that they have no "direct evidence" or that they have no "evidence" or "proof" just "feelings," they are not giving factual testimony.[5] Since they are laymen, it is factual evidence that they gave, not the legal characterization, which was entitled to any weight. The factual evidence, on which the jury properly relied, showed the causal connection between the cancellation of the JDS contract and the union's acts.

---

[4]McKinnon testified about numerous instances of damages to the buses after the strike which under all the circumstances must have been caused by purposeful sabotage. The District Court accepted this evidence for purposes of the hypothetical to Kalibat, which the court referred to as the "correct version of the evidence."

[5]On cross-examination, Westgate testified that when she said she had no evidence she meant no "direct evidence." She did not know what "circumstantial evidence" was.

We recognize that this Court will not grant certiorari in the usual case in which a Circuit Court allegedly misevaluates the record. However, this case is unusual. Each of the points argued in this section of the cross-petition was argued to the Circuit Court on a petiton for rehearing with meticulous citation to the record, and the Circuit Court did not modify its opinion. It simply cannot be concluded on this record that Woodward did not commence discovery until after his criminal charges were dropped or that the union's campaign of sabotage against Yellow Bus had nothing to do with its inability to pay its bills or the departure of its skilled mechanic. Because the Circuit Court's decision setting aside the jury's verdict constitutes a clear denial of cross-petitioners' Seventh Amendment rights, and because the preclusive effect of the judgments on the common law torts will interfere with cross-petitioners' RICO claims, the cross-petition for certiorari should be granted.

CONCLUSION

For all of the reasons advanced, the cross-petition should be granted.

Respectfully submitted,

Thomas G. Corcoran, Jr.
(Counsel of Record)
Henry M. Lloyd
Corcoran, Youngman & Rowe
Suite 1100
1511 K Street, N.W.
Washington, D.C. 20005
(202)783-7900
Counsel for Cross-Petitioners

September 1, 1988

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

FLANNERY, J.

82-3154

James F. Woodward
Plaintiff,

v.

Michael DiPalermo, et al.,
Defendants.

SUMMONS

To the above named Defendant: Paula Westgate

You are hereby summoned and required to serve upon Gary M. Sidell, plaintiff's attorney, whose address — 918 F Street, NW, Suite 440, Wash., D.C. 20004 — *After* Nov. 24, 1982: 419 Seventh St. NW, Suite 201, Wash, DC 20004, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JAMES F. DAVEY
Clerk of Court.
/s/ [Illegible]
Deputy Clerk
[Seal of Court]

Date: NOV 4 1982

CIVIL SUBPOENA

UNITED STATES DISTRICT COURT
for the
District of Columbia

JAMES F. WOODWARD
Plaintiff.

vs.

Civil Action No. 82-3154

MICHAEL DiPALERMO ET AL,
Defendants

To: Paula Westgate, 2000 Kendall Street, N.E., Washington, D.C. 20002

You Are Hereby Commanded to appear in the (office of Gary M. Sidell, 419 Seventh Street, N.W., Suite 201, Washington, D.C. 20004) to give testimony in the above-entitled cause on the 26th day of November, 1982, at 1:30 o'clock p.m. (*and bring with you*) those documents and materials listed in the accompanying NOTICE OF DEPOSITIONS, attached hereto and do not depart without leave.

James F. Davey, *Clerk*
By /s/ Robert L. Line
Deputy Clerk

Date November 15, 1982
Gary M. Sidell 783-0060
Attorney for Plaintiff.

RETURN ON SERVICE

Summoned the above-named witness by delivering a copy to her on the ____ day of November, 1982, at 2000 Kendall Street, N.E., Washington, D.C.

Under Penalty of Perjury:

Dated_____

Steve Carmody

Subscribed and sworn to before me, a this _____ day of _____, 19____

Note.— Affidavit required only if service is made by a person other than a U.S. Marshal or his deputy.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES F. WOODWARD,	:	
	:	
Plaintiff	:	
	:	
v.	:	Civil Action
	:	No. 82-3154
MICHAEL DiPALERMO ET AL.,		:
	:	
Defendants	:	

Pursuant to the provisions of F.R.C.P. 30, 34 and Local Rule 1-16, Plaintiff James F. Woodward, by his attorney, Gary M. Sidell, hereby provides notice of his intent to take the deposition on oral examination of the following defendants in this action at the following time, date and location:

1. Ms. Maria Triggs
   Friday
   November 26, 1982 @ 9:30 a.m
   419 Seventh Street, N.W.
   Suite 201
   Washington, D.C. 20004

2. Ms. Paula Westgate
   Friday
   November 26, 1982 @ 1:30 p.m.
   419 Seventh Street, N.W.
   Suite 201
   Washington, D.C. 20004

Each defendant is hereby requested to produce at the deposition the following materials:

1. Any and all notes, memos, reports or other materials involving James F. Woodward and/or Local Union 639 and their

efforts to aid the employees of Yellow Bus Company in establishing a union.

2. A legible copy of the Yellow Bus Company charter, articles of incorporation, by-laws, minutes for all meetings of the officers and/or board of directors during the period of October 15 through and including December 15, 1981.

3. A resume detailing all background information of each defendant, including, but not limited to, education, residence for the past ten (10) years, employment (both full and part-time or temporary) and any special awards, recognitions or citations.

4. Legible copies of any insurance policies or indemnification agreements which may cover any damages awarded in this case against any of the officers of the Yellow Bus Company.

/s/ Gary M. Sidell
Gary M. Sidell
918 F Street, N.W.
Suite 440
Washington, D.C. 20004
783-0060
Trial Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify under the penalties of perjury that I have hand-delivered a copy of the foregoing NOTICE OF DEPOSITIONS to Maria Triggs and Paula Westgate, defendants in this proceeding, at 2000 Kendall Street, N.E., Washington, D.C. 20002, this ____ day of November, 1982.

_____
Steve Carmody

SUPERIOR COURT
OF THE
DISTRICT OF COLUMBIA
Holding a Criminal Term
Grand Jury Sworn in on October 22, 1982

PLAINTIFF'S EXHIBIT 52

THE UNITED STATES OF AMERICA	:	
	:	Criminal No:
v.	:	Violation: 2 D.C.
	:	Code 2307; 50
JAMES F. WOODWARD	:	(Threatening to Damage Property;

The Grand Jury charges:

FIRST COUNT:

On or about November 9, 1982 [sic], within the District of Columbia, James F. Woodward threatened to damage buses of the Yellow Bus Company, a body corporate, in whole or in part. (Threatening to Damage Property, in violation of 22 D.C. Code, Section 2307.)

SECOND COUNT:

On or about June 8, 1982, within the District of Columbia, James F. Woodward threatened to injure the person of Richard C. Morauer and Richard C. Morauer, Jr. (Threatening to Injure a Person, in violation of 22 D.C. Code, Section 2307)

THIRD COUNT:

On or about June 8, 1982, within the District of Columbia, James F. Woodward threatened to injure the person of Thomas Collins. (Threatening to Injure a Person, in violation of 22 D.C. Code, Section 2307)

/s/Stanley S. Harris/st
Attorney of the United States in
and for the District of Colubmia

A TRUE BILL:
/s/ [Illegible]

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES OF AMERICA	
v.	Criminal Action No. F 6874-81
JAMES F. WOODWARD,	
Defendant	

Tuesday, February 8, 1983

The above-entitled action came on for a disposition before the HONORABLE PAUL WEBBER, Associate Judge, in Courtroom Number 20, commencing at approximately 2:20 p.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL COURT REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HER ORIGINAL NOTES AND RECORDS OF PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:
CHARLES BROOKS, Esquire
Assistant United States Attorney

On behalf of the Defendant:
GARY SIDELL, Esquire
Washington, D.C.

Ms. Jewell F. Irving
Official Court Reporter

727-1766

Supreme Court, U.S.
FILED
SEP 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

YELLOW BUS LINES, INC.,
PAULA WESTGATE, MARIA TRIGGS, and
PETER MCKINNON,
Cross-Petitioners,

v.

DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 639 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, and JAMES F. WOODWARD,
Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the findings of fact by the two lower courts demonstrate a very obvious and exceptional showing of error.

2. Whether RICO Section 1962(c) requires that the person engaging in the pattern of racketeering be distinct from the requisite RICO enterprise.

PARTIES BELOW AND AFFILIATES OF RESPONDENT

Pursuant to Rule 28.1, Respondent Local 639 states that it is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

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STATUTES *

Racketeer Influenced and Corrupt Organizations Act, ("RICO"), 18 U.S.C. § 1961, *et seq*..... 4-6

* The applicable portion of RICO, 18 U.S.C. § 1962(c), is set forth in the Appendix.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

YELLOW BUS LINES, INC.,
PAULA WESTGATE, MARIA TRIGGS, and
PETER MCKINNON,
Cross-Petitioners,

v.

DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 639 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, and JAMES F. WOODWARD,
Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The necessary facts are set forth in the Petition for a Writ of Certiorari filed by Respondents Drivers, Chauffeurs and Helpers Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO ("Local 639" or "the Union") and James F. Woodward on August 1, 1988 in case No. 88-190. (pp. 3-9).

REASONS FOR DENYING THE WRIT

Cross-Petitioners' primary purpose, to obtain review of the factual determinations made below, is an insufficient basis for granting the petition for a writ of certiorari. The alternative basis for review, the determination that RICO Section 1962(c) requires that the culpable person be separate and distinct from the denominated enterprise, is similarly unavailing because the court of appeals' decision is consistent with the overwhelming weight of authority.

I. THE FACTUAL DETERMINATIONS MADE BELOW DO NOT WARRANT REVIEW

A fair reading of the cross-petition reveals that it is merely a request that this Court grant certiorari in order to review the concurrent factual determinations made by the district court and affirmed by the court of appeals. Cross-Pet. at 8-15. Aside from the fact that Cross-Petitioners' assertions are contrary to the record evidence, it is well settled that this Court will not grant a writ of certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925); *General Talking Pictures Corp. v. Western Electric Co., Inc.*, 304 U.S. 175, 178 (1938); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). The Supreme Court is "not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other . . ." *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951). Certiorari should be granted only on issues which are of importance to the public as distinguished from that of the parties. *Id.* at 502. *See also Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74-79 (1955).

Certiorari is particularly inappropriate in cases, such as the instant one, where the appellate panel thoroughly examined the district court decision and its factual de-

terminations and concurred in them. Indeed, the court of appeals reversed the lower court's conclusion that Local 639 was not liable for the minor vandalism occurring during the four-day strike. Local 639 Pet. App. 4a-8a. In such situations where the court of appeals has reviewed and concurred in the record as determined by the district court, this Court has followed its "two-court" rule. Pursuant to that policy, this Court will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Berenyi v. Immigration Service*, 385 U.S. 630, 635 (1967), citing *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

In apparent recognition of this flaw, Cross-Petitioners have sought to disguise their factual arguments in constitutional garb. Cross-Pet. 15. One fleeting reference to the Seventh Amendment on the final page of the cross-petition, however, cannot cure this fatal defect. As stated by Justice Frankfurter:

> If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict. Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this Court that the Constitution has been violated. This verbal smoke screen cannot obscure the truth that all that is involved is an appraisal of the fair inferences to be drawn from the evidence.

Dick v. New York Life Ins. Co., 359 U.S. 437, 455-56 (1959) (Frankfurter J., dissenting).[1] This Court should

[1] Justice Frankfurter's lament was part of his continuing objection to the Court's review of cases brought under the Federal Employer's Liability Act and Jones Act, under the guise that such

recognize the verbal smoke screen created by the Cross-Petitioners and deny the request for certiorari.

II. THE REQUIRED DISTINCTION BETWEEN A CHARGED PERSON AND AN ENTERPRISE IS EMBODIED IN RICO SECTION 1962(c)

An overwhelming majority of the lower courts have now construed RICO Section 1962(c) to require that the "person" who engages in the pattern of racketeering activity be separate and distinct from the requisite "enterprise." *United Energy Owners Committee, Inc. v. United States Energy Management Systems, Inc.*, 837 F.2d 356, 364 (9th Cir. 1988); *Saporito v. Combustion Engineering, Inc.*, 843 F.2d 666, 678 (3d Cir. 1988); *Paradise Hotel Corp. v. Bank of Nova Scotia*, 842 F.2d 47, 53 (3d Cir. 1988); *Entre Computer Centers, Inc. v. FMG of Kansas City, Inc.*, 819 F.2d 1279, 1287 (4th Cir. 1987); *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 440-41 (5th Cir.), *cert. denied*, 107 S.Ct. 3276 (1987); *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122, 122-123 (5th Cir. 1986); *Schreiber Distributing v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1396-98 (9th Cir. 1986); *United States v. Benny*, 786 F.2d 1410, 1415-16 (9th Cir. 1986), *cert. denied*, 479 U.S. 1017 (1987); *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 29-30 (1st Cir. 1986); *B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628, 633-34 (3d Cir. 1984); *Bennett v. United States Trust Co. of New York*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *Haroco v. American National Bank & Trust Co.*, 747 F.2d 384, 401-02 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985); *United States v.*

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review was necessary to protect the right to a jury trial. *See, e.g., Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 506-07 (1957). It appears that the Court has adopted the validity of Justice Frankfurter's position. *See Felts v. Seaboard Coast Line Railroad Co.*, 409 U.S. 926 (1972); *Adkins v. Kelly's Creek Railroad Co.*, 409 U.S. 926 (1972).

Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); *Bennett v. Berg*, 685 F.2d 1053, 1061-62 (8th Cir. 1982), *modified*, 710 F.2d 1361 (*en banc*), *cert. denied*, 464 U.S. 1008 (1983); *Alexander Grant & Co. v. Tiffany Industries, Inc.*, 742 F.2d 408, 411, n.6 (8th Cir.), *cert. denied*, 469 U.S. 1205 (1984).

The position adopted by these courts is consistent with both the plain language of the statute and the legislative intent underlying the enactment of RICO. Section 1962(c) prohibits any person employed by or associated with an enterprise from conducting that enterprise through a pattern of racketeering activity. The provision clearly requires a relationship between a "person" and an "enterprise" in order to state a claim. Only the person employed by or associated with the enterprise, not the enterprise itself, may violate Section 1962(c).[2] "The enterprise is mentioned in the section only as the instrument of the person doing the racketeering, and there is no suggestion that the enterprise also may be liable . . . ." *Schofield v. First Commodity Corp.*, 793 F.2d at 30. This is consistent with the legislative intent underlying the enactment of RICO. Inasmuch as the articulated purpose of RICO was to thwart the infiltration of legitimate businesses, "it is logical that Congress would have designed Section 1962(c) so that it reached the criminal but protected the victimized enterprise from liability." *Id.* at 31. *See also B.F. Hirsch v. Enright Refining Co.*, 751 F.2d at 633-34; *Bennett v. United States Trust Co. of New York*, 770 F.2d at 315.

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[2] Conversely, Section 1962(a) contains no such limitation and, accordingly, the courts have held that the defendant person and the enterprise can be the same for purposes of Section 1962(a). *United Energy Owners Committee, Inc. v. United States Energy Management Systems, Inc.*, 837 F.2d at 364; *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d at 1396-98; *Schofield v. First Commodity Corp.*, 793 F.2d at 31-32.

The only authority contrary to the decisions cited above is the ruling of the Eleventh Circuit Court of Appeals in *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). In *Hartley*, the court acknowledged that it was presented with a case of first impression (*Id.* at 988), and agreed with the government's suggestion, and the defendant's concession, that the problem would never have occurred had the government merely reframed the indictment in that case. *Id.* at 989. ("Had the government elected to charge the defendants in this manner, it would certainly have alleviated this lengthy discussion.") Subsequent to *Hartley*, the courts have consistently rejected its rationale and holding. Rather than evidencing a split among the lower courts, it represents an idiosyncratic view of the statute at a time when the case law was in its infancy. Inasmuch as the courts below are in almost total agreement on this issue, it does not warrant this Court's review.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September, 1988

APPENDIX

STATUTORY PROVISION INVOLVED

18 U.S.C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.